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Arizona Corporation Commission

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Chairman

JIM IRVIN

Commissioner

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Commissioner

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In the matter of:

DOCKET NO. S-03418A-01-0000

Ronald Lee Keel

1849 Viola Drive

Sierra Vista, Arizona 85635

Donald Ramey

211 N. 4th Street

Sierra Vista, Arizona 85636

Meracana Mining Corporation

1849 Viola Drive

Sierra Vista, Arizona 85635,

Respondents.

SECURITIES DIVISION'S REPLY
TO RESPONDENT RAMEY'S
RESPONSE TO SECURITIES
DIVISION'S MOTION TO QUASH
DEPOSITION AND SUBPOENA TO
JERRY LOWE

(A.L.J. Philip J. Dion III)

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") hereby replies to Respondent Ramey's Response To Securities Division's Motion To Quash Deposition And Subpoena Of Jerry Lowe ("Response") and requests that the Commission grant the Division's motion to quash Respondent's notice of deposition and subpoena to Jerry Lowe based upon the original motion and the arguments below.

I. RESPONDENT IS NOT ENTITLED TO TAKE DEPOSITION OF JERRY LOWE OR OF OTHER WITNESSES IDENTIFIED BY THE DIVISION

Respondent complains that the Division listed investigator Jerry Lowe as a witness to testify at the hearing without describing the nature or his testimony or why he will be needed at all. The Respondent takes the position that mere disclosure of a witness' name without more is meaningless and therefore by subpoenas and depositions this situation can be remedied. Respondent fails to understand that this is an administrative proceeding, not a civil or criminal proceeding. The depth of pre-hearing discovery in an administrative proceeding is greatly

1 curtailed as opposed to a civil or criminal proceeding. This is premised on the fact that there is not
2 a basic constitutional right to pre-hearing discovery in administrative proceedings. Silverman v.
3 Commodity Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977); N.L.R.B v. Interboro
4 Contractors, Inc., 432 F.2d 854, 857 (2d Cir. 1970), cert. denied, 402 U.S. 915, 91 S.Ct. 1375
5 (1971); Starr v. Commissioner of Internal Revenue, 226 F.2d 721, 722 (7th Cir. 1955), cert.
6 denied, 350 U.S. 993, 76 S.Ct. 542 (1956). In fact, pre-trial discovery was not even available in
7 federal courts until 1938. N.L.R.B v. Interboro Contractors, Inc., 432 F.2d at 858. The extent of
8 discovery a litigant is entitled to in administrative proceedings is primarily determined by the
9 particular agency involved. Mister Discount Stockbroker, Inc., v. S.E.C., 768 F.2d 875, 878 (7th
10 Cir. 1985). The landmark criminal case Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963),
11 which requires the government to disclose exculpatory evidence in criminal cases, does not apply
12 to administrative proceedings. Id. at 878. The difference between due process rights in criminal
13 cases as opposed to administrative cases is significant. Id. at 878. As supported by the case law
14 above, discovery is not an essential element of due process.

15 Nowhere in Respondent's Response does he address the language in A.A.C. R14-3-101(A).
16 As the Division set-forth in its motion to quash the notice of deposition and the subpoena, the
17 Rules of Practice and Procedure found in Chapter 3, Title 14 of the Administrative Code are
18 followed only when they are not in conflict with the law or the regulations or orders of the
19 Commission. See A.A.C. R14-3-101(A). To reiterate the Division's prior argument, the
20 confidentiality statute and rule, respectively A.R.S. § 44-2042(A) and A.A.C. R14-4-303(A),
21 specifically apply to the Division and supersedes A.A.C. R14-3-109(P) with respect to Jerry
22 Lowe's deposition. This is because the content of whatever Mr. Lowe testifies to in a deposition
23 was obtained during the course of an investigation by the Division and is classified as
24 "confidential." The Division is not required under the confidentiality statute or rule or under any
25 other authority, to articulate any reason why the confidential information should be protected.

26 ...

1 When the Division, at a hearing, proves the allegations in the Notice of Opportunity For Hearing,
2 the testimony of Mr. Lowe and any exhibits entered into evidence will be a matter of public record.

3 It is not uncommon in the State of Arizona to have statutes holding certain information
4 confidential and non-disclosable. For example, A.R.S. § 44-1525, titled "Confidentiality of
5 information or evidence" requires that in consumer fraud cases all information or evidence
6 provided to the attorney general shall be confidential unless in the attorney general's judgment
7 publication of the information serves justice and the public interest. Since Respondent has already
8 received documents the Division expects to use as exhibits at the hearing, there is no further
9 interest of justice or public interest served by allowing Mr. Lowe to be deposed or by delivering
10 the entire file to Respondent per their subpoena. Some of the other Arizona statutes deeming
11 certain information confidential are: tax reports (A.R.S. § 23-722), conciliation court records
12 (A.R.S. § 25-381.16) and records of the Department of Health Services (A.R.S. § 36-105).

13 Respondent's right to take depositions of witnesses other than Jerry Lowe is also
14 questionable since depositions pursuant to A.A.C. R14-3-109(P) must be in accordance with the
15 Rules of Civil Procedure. Rule 30(a), Rules of Civil Procedure, only allows for the deposition of a
16 party to be taken. There are two exceptions to this restriction, one is by agreement of all parties
17 and the other is by order of the court. This rule regarding depositions was adopted with the
18 Utilities Division and its procedures in mind. If the Commission allows for the Division's
19 witnesses, other than Jerry Lowe, to be deposed, then the Division requests that limitations, such as
20 time limitations, be imposed on Respondent.

21 **II. RESPONDENT IS RECEIVING DUE PROCESS OF LAW UNDER THE** 22 **ARIZONA AND THE UNITED STATES CONSTITUTIONS IN THESE** 23 **ADMINISTRATIVE PROCEEDINGS**

24 Due process simply means that state actions cannot be arbitrary or without proper
25 procedure. Sulger v. Arizona Corporation Commission, 5 Ariz.App. 69, 73, 423 P.2d 145 (1967).
26 Proper procedure includes: ". . . notice of time and place of hearing, a reasonable definite
statement of the charges, the right to produce witnesses and to have a full consideration and

1 determination according to evidence before the body with whom the hearing is held. Id. at 73.
2 The court in the Sulger case, a case also quoted by Respondent in his Response, found the
3 Commission violated the appellant's substantive and procedural due process rights because the
4 Commission did not inform appellant of the precise nature of the charges and it did not set-forth in
5 its order the violations it found. Id. at 74. Appellant virtually had to prepare to face all the
6 relevant rules, regulations and statutes at the hearing. Nowhere in this case, does the court discuss
7 any general right to pre-hearing discovery.

8 Respondent is under the false assumption that due process in administrative proceedings
9 encompasses extensive pre-hearing discovery such as depositions and subpoenas. Preclusion of
10 pre-hearing discovery is not a violation of due process rights under the Arizona and United States
11 Constitutions. In an Eight Circuit court case, the petitioner claimed that the administrative law
12 judge's denial of four motions to require answers to interrogatories to the USDA deprived
13 petitioner of its right to pre-hearing discovery and was thus a violation of its due process rights
14 under the United States Constitution. Beef Nebraska, Inc. v. U.S.A. Dept. Agriculture, 807 F.2d
15 712 (8th Cir. 1986). Prior to the hearing in this matter, petitioner had been given access to all
16 exhibits to be offered by the USDA and the USDA's list of witnesses. The court held that the
17 administrative law judge did not deprive petitioner of any of its discovery rights it might have had.
18 Id. at 719.

19 The Response by Respondent relies significantly on the United States Supreme Court case
20 of Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976). The issue in the Mathews v. Eldridge
21 case was whether or not a recipient of social security disability benefits should be afforded an
22 opportunity for an evidentiary hearing prior to termination of the benefits under the Due Process
23 Clause of the Fifth Amendment of the United States Constitution. The court found that due
24 process does require as a fundamental principal the opportunity to be heard at a meaningful time
25 and in a meaningful manner. Id. at 333, 902. The three factors to comply with the dictates of due
26 ...

1 process listed by the court in Mathews v. Eldridge and by Respondent in his Response will be
2 addressed briefly below.

3 A. Private Interest

4 Respondent asserts that he has a fundamental property interest at stake because he faces
5 loss of his entire life savings and more if he loses his case. Loss of life savings is not a
6 fundamental property interest that is protected by due process. In addition, if Respondent loses his
7 life savings, it will not be done arbitrarily and without the opportunity to speak and present
8 evidence in his own defense at meaningful times and in a meaningful manner. Id. at 332, 902.
9 Respondent's loss of money is not a persuasive factor at issue in favor of finding a violation of
10 Respondent's due process rights. Respondent's loss of his savings certainly does not outweigh the
11 Division's interest in thwarting and punishing those persons whom violate the Securities Act of
12 Arizona ("Securities Act").

13 In the Response, Respondent cites to and attaches an Ohio case that addresses disclosure of
14 files by the Ohio Division of Securities. State Ex Rel. Dublin Securities, Inc., v. Ohio Division of
15 Securities, 68 Ohio St.3d 426, 627 N.E.2d 993 (1994). The Supreme Court of Ohio reversed the
16 appeal's court decision and held that appellee could not have access to the Division's files, other
17 than regularly filed documents such as registration filings, since appellee did not have a direct
18 economic interest in the file. Id. at 428, 995. The court held that persons with direct economic
19 interest should generally be limited to consumers who, for example, desired to review the
20 Division's files for purposes of filing a civil action and not to the target of an investigation as was
21 appellee. Id. at 432, 998. The Ohio statute governing confidentiality of its Securities Division's
22 files was obviously worded differently than the Arizona confidentiality statute, but it had the same
23 general purpose in maintaining the files and information confidential. If anything, this case
24 supports the Division's position that its files and information on this case are confidential and not
25 subject to discovery by Respondent.

26 . . .

1 B. Risk of Erroneous Decision

2 Respondent claims that in order to adequately prepare a defense it must be provided with
3 disclosure in a **meaningful manner** and in a **meaningful time** (emphasis added in Respondent's
4 Response). Due process does not require disclosure in a meaningful manner and in a meaningful
5 time, it does require as shown above, the opportunity to be heard at a meaningful time and in a
6 meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976).

7 Respondent will have the opportunity to present his own evidence and witnesses at a
8 hearing and to cross-examine the Division's witnesses to ensure no erroneous decision is made.
9 The Respondent already has the documents the Division is relying on to prove its case at a hearing.
10 Should the Division decide to use additional documents as evidence at a hearing then it will deliver
11 the documents to Respondent. The Division has learned that all the boxes of documents it received
12 from respondent Ronald Keel concerning Meracana Mining Corporation, Inc. ("Meracana"), are
13 now in the possession of Respondent. According to respondent Ronald Keel, these same boxes of
14 documents constituted all of the documents in his possession pertaining to Meracana. Any other
15 documents regarding Meracana would have already been in the possession of Respondent as the
16 former director, vice-president and secretary of the company. Considering the above facts,
17 Respondent will not be "blind-sided" at the hearing as he claims and there is no risk of an
18 erroneous decision.

19 C. State's Interest

20 The Division has a number of strong interests in maintaining its files confidential. Besides
21 the confidentiality statute and rule already discussed, the Division always has an interest in
22 preventing further violations of the Securities Act and in punishing those who have violated the
23 Securities Act. The Division has an interest in keeping confidential the names of persons
24 supplying it information about violators of the Securities Act and the methods by which it attains
25 its information. In addition, the Division has a strong interest in maintaining documents and
26 ...

1 information it received from law enforcement agencies that are confidential and protected from
2 disclosure under the investigative privilege.

3 Clearly, as argued in more detail above, the Arizona state legislature has determined that
4 there is a strong state interest in keeping certain documents and information confidential by not
5 divulging them to the public. Otherwise, the state legislature would not have considered and
6 passed statutes such as A.R.S. §§ 44-2042 and 44-1525.

7 **III.CONFIDENTIALITY STATUTE AND RULE DO NOT INVADE UPON ANY** 8 **FUNDAMENTAL RIGHTS OF RESPONDENT**

9 Respondent contends that the confidentiality statute and rule deprive him of his guaranteed
10 fundamental rights under the Arizona and United States constitutional. A fundamental right is
11 defined as “. . . one that is ‘deeply rooted in this Nation’s history and tradition,’ or is so weighty
12 as to be ‘implicit in the concept of ordered liberty’ such that ‘neither liberty nor justice would
13 exist if it were sacrificed.’” State v. Watson, 198 Ariz. 48, 52, 6 P.3d 752, 756 (2000).
14 Respondent does have a fundamental right to fairness against governmental deprivation of life,
15 liberty, or property. Arizona Farm Workers Union v. Agricultural Employment Relations Board,
16 148 Ariz. 47, 50, 712 P.2d 960 (1986). Even if Respondent loses after a hearing and is found to
17 have violated the Securities Act and is ordered to pay restitution and a penalty, he will not lose his
18 life or liberty. This is not a criminal proceeding. The only deprivation Respondent can allege in
19 good-faith is deprivation of property. Any property Respondent loses will be in the form of
20 money to pay restitution to investors in Meracana and to pay a penalty. This loss will only come
21 after a full and fair hearing.

22 As stated above, there is no constitutional right to pre-hearing discovery. This means there
23 can be no violation of Respondent’s fundamental rights under the Arizona or Federal due process
24 clause if his discovery requests are denied.

25 Since Respondents fundamental rights have not been implicated, the confidentiality statute
26 must be reviewed under the “rational basis” test, not under the “compelling state interest” test as

1 Respondent contends. Watson, 198 Ariz. at 52. This type of review gives significant deference
2 to the judgment of the legislative body. Id. at 52. In order to successfully attack the
3 confidentiality statute under the rational basis test, Respondent must prove the statute lacks any
4 conceivable rational basis. Heller v. Doe, 509 U.S. 312, 320-21, 113 S.Ct. 2637, 2642-2643
5 (1993). Respondent has not in any way whatsoever shown that the confidentiality statute lacks
6 any conceivable rational basis. A statute that does not involve a fundamental right is accorded a
7 strong presumption of validity and the state has no obligation to produce evidence to sustain the
8 rationality of the statute. Id. at 319-320, 2642-2643.

9 A. Division's Application of Confidentiality Statute and Rule is Fair and is not an
10 Unconstitutionally Overbroad Restriction of Respondent's Due Process Rights

11 As argued above, since Respondent has really not implicated any true fundamental right,
12 the application of the confidentiality statute and rule by the Division is fair. Since the application
13 by the Division of the confidentiality statute and rule is fair, there is no unconstitutionally
14 overbroad restriction of Respondent's due process rights as he would have us believe.

15 Respondent argues that the Division should articulate why disclosure of documents in its
16 file is not contrary to the public interest. The Divisions listed above some of the reasons it believes
17 its records and information should be kept confidential. The Division does not have the burden of
18 proving why disclosure of confidential information and documents is not contrary to the public
19 interest. Just as the Arizona Attorney General has an inherent interest in maintaining documents
20 and information it receives for consumer fraud investigations confidential, so does the Division
21 have an interest in keeping information and documents it obtains during an investigation
22 confidential.

23 B. Fundamental Fairness Does Not Require That Respondent be Granted the Disclosure he
24 Seeks

25 The contention by Respondent that his fundamental rights have been violated is addressed
26 in great detail above and will not be reiterated here. Respondent attacks the Division's refusal to
turn over its file and allow Mr. Lowe to be deposed on the premise that disclosure of the Division's

1 file will not be “contrary to public interest.” Pursuant to A.R.S. § 44-2042(A), names, information
2 and documents can be disclosed if they are “not contrary to the public interest.” The words
3 “public interest” is not defined in the Securities Act. Respondent mischaracterizes his personal
4 request for discovery as “public interest.” The words “public interest” are defined in Black’s Law
5 Dictionary, Fifth Edition, as:

6 Something in which the public, the community at large, has some pecuniary interest,
7 or some interest by which their legal rights or liabilities are affected. It does not
8 mean anything so narrow as mere curiosity, or as the interests of the particular
9 localities, which may be affected by the matters in question. Interest shared by
10 citizens generally in affairs of local, state or national government.

11 See also, Russell v. Wheeler, 165 Colo. 296, 439 P.2d 43, 46 (1968). To give meaning to the
12 words “public interest,” one must consider the purpose for which the regulation was adopted.
13 National Ass’n for Advancement of Colored People v. Federal Power Commission, 425 U.S. 662,
14 669, 96 S. Ct. 1806, 1811 (1976).

15 By analogy to Arizona’s confidentiality statute and rule, the “public interest” in connection
16 with disclosure under the Freedom of Information Act (“FOIA”) is “the extent to which disclosure
17 would serve the core purpose of the FOIA, which is contributing significantly to the public
18 understanding of the operations or activities of the government.”” Stabasefski v. United States,
19 919 F. Supp. 1570, 1575 (M.D.Ga. 1996) (quoting United States Dep’t of Defense v. Federal
20 Labor Relations Authority, 510 U.S. 487, 114 S. Ct. 1006, 1012 (1994)). “The public interest
21 does not include the disclosure of information about private citizens that is accumulated in various
22 governmental files but that reveals little or nothing about an agency’s own conduct.”” Id. (quoting
23 United States Dep’t of Justice v. Reporters Committee, 489 U.S. 749, 773, 109 S. Ct. 1468, 1482
24 (1989)).

25 A.R.S. § 44-2042, a statute that impacts public records law, is adopted in the Securities
26 Act. The purpose of the Securities Act is to protect the public in connection with the sale or

1 purchase of securities, preserve fair and equitable business practices, suppress fraudulent or
2 deceptive practices in the sale or purchase of securities, and to prosecute persons engaging in
3 fraudulent or deceptive practices in the sale or purchase of securities. Laws 1951, Ch. 18, § 20
4 (stating the intent and purpose of the Arizona Securities Act). Therefore, the purposes of the
5 Securities Act is more relevant to the meaning of the words “public interest” as contained in § 44-
6 2042(A).

7 Respondent cites to Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623 (1957), in an effort
8 to support its fundamental fairness argument. The Roviaro case is a criminal case not an
9 administrative case. The fundamental fairness rights of a criminal defendant are significantly
10 heightened as opposed to Respondent’s fundamental fairness rights in these administrative
11 proceedings. As argued above, the disclosure requirements in criminal cases as set-forth in Brady
12 v. Maryland and its progeny are inapplicable to administrative law cases. See Mister Discount
13 Stockbroker, 768 F.2d at 878.

14 Respondent complains in his Response that without meaningful disclosure by the Division
15 he will be at a “complete loss as to the factual basis of the Division’s allegations.” This contention
16 is absurd considering Respondent has the documents the Division, as of now, intends to use as
17 exhibits at the hearing. These documents include the transcript of the examination under oath of
18 Respondent. The Respondent was served with a Notice of Opportunity For Hearing listing the
19 factual allegations of violations of the Securities Act against respondents. Respondent also has in
20 his possession all the documents respondent Ronald Keel, director and president of Meracana, had
21 in his possession concerning Meracana. Furthermore, the Division, by procedural order of the
22 administrative law judge, is only required to deliver its witness list and exhibits to Respondent no
23 later than 10 days before the hearing. Although the Division has not delivered its exhibits to
24 Respondent, it has delivered the documents it plans on marking and using as exhibits at the
25 hearing.

26 . . .

1 **IV. CONCLUSION**


2 Respondent is not entitled to take the deposition of Jerry Lowe and other witnesses. If
3 Respondent is allowed to conduct depositions, the Division asks that reasonable limitations, such
4 as time limitations, be imposed.

5 Respondent has and will continue to receive due process of law under the Arizona and
6 United States constitutions. Respondent has not implicated a fundamental right with respect to his
7 quest for pre-hearing discovery and the confidentiality statute, A.R.S. § 44-2042(A), therefore, the
8 rational basis test must be applied to determine the constitutionality of A.R.S. § 44-2042(A). In
9 order for Respondent to prove A.R.S. § 44-2042(A) is unconstitutional, he must show the statute
10 lacks any conceivable rational basis. Respondent has not even come close to making this showing.

11 Based upon the above arguments, the Division asks that Respondent's request for an
12 itemized list of documents in the Division's files on this case be denied and that Respondent's
13 notice of deposition and subpoena to Jerry Lowe be quashed.

14 RESPECTFULLY SUBMITTED this 10th day of June, 2002.

15 **Janet Napolitano**
16 Attorney General for the State of Arizona

17 
18 **Anthony B. Bingham**
19 Special Assistant Attorney General
20 **Moira McCarthy**
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23 Arizona Corporation Commission
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1 Original and ten copies of the
2 foregoing docketed with Docket Control
this 10th day of June, 2002

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